10/17/75
Circulate, Hew
new file.

First Principles.

NATIONAL SECURITY AND CIVIL LIBERTIES

IN THIS ISSUE SEPTEMBER 1975 VOL. 1 NO. 1

Why First Principles

ALONG WITH THE CONCENTRATION of political power in the executive branch of government has come the claim that "national security" somehow dictates that we must give up some of our civil liberties in order to protect our freedoms. This claim has not been seriously challenged until the last several years; the veil of secrecy placed over the activities of the executive branch also served to protect these actions from effective public and congressional scrutiny.

With the unfolding of recent events, however, the myth of official benevolence, unanimity, and even expertise began to crumble. It began to emerge that for all practical purposes successive administrations had come to think of the Congress and the American public like a foreign power to be deceived and investigated in the interests of the nation's security. From the initial deceptions a ripple effect began as a system of secret actions were taken to reinforce breaches in secrecy — such as the wiretaps that followed news reports of bombing in Cambodia. Using the claims of "national security" as an incantation to overwhelm all logic, legitimate political controversy was cast into the mold of dissidence and disloyalty. As the trickle of information about illegal government activities grew into a river in Watergate, the credulity of the public changed into a healthy skepticism. But, as Professor Philip Kurland notes in his article in this issue, the executive branch still makes a plea to institutionalize the Cold War era's blind trust in the Presidency. For example, the Rockefeller Commission Report, in spite of all its detailing of CIA abuses, calls for an expanded CIA charter which would solve the problem somehow by making many of its currently illegal actions legal. Likewise, the administration bill S. 1 (the reform of the federal criminal code) would define as unequivocal espionage the Ellsberg "offense" of releasing information to the public. The list of such efforts is a lengthy one — the article on page 3 treats more of them.

The focus of **First Principles: National Security and Civil Liberties** will be on following these issues and the many turns and twists taken in the conflict between expansive claims of national security and civil liberties. We hope to contribute to a return to First Principles — the necessary and vital right of full and informed public participation in government — by increasing public awareness of continuing threats and of opportunities to improve the situation.

Each monthly issue of First Principles will include an up-date on what has happened in the Congress, the Courts, and elsewhere that affects the conflicting claims of national security and civil liberties. There will also be a literature review keeping you abreast of relevant books, articles, and government publications. Each issue will also focus on a particular topic with guest articles, citations of leading cases, and analysis. In this inaugural issue we survey the field as a whole. Next month we will turn to national security wiretaps.

It is at all times necessary, and more particularly so during the progress of a revolution and until right ideas confirm themselves by habit, that we frequently refresh our patriotism by reference to first principles.

THOMAS PAINE

In The News

July 1, 1975 President Ford directed the Justice Department to observe throughout the country the holding by the District of Columbia Court of Appeals in *Zweibon v. Mitchell* prohibiting warrantless wiretaps of Americans not agents of a foreign power.

July 9, 1975 Attorney General Levi states "there are no outstanding instances of warrantless taps or electronic surveillance directed against American citizens and none will be authorized by me except in cases where the target of the surveillance is an agent or collaborator of a foreign power."

July 16, 1975 An unidentified FBI official revealed that up until 1966 the FBI conducted dozens and sometimes more than a hundred burglaries a year. The break-ins were conducted in cases where it was not possible to obtain search warrants. The burglaries were directed not only at "national security" investigations (the Communist Party, embassies, etc.) but also at ordinary criminal cases. The burglaries were stopped in 1966 when J. Edgar Hoover failed to get then-Attorney General Ramsey Clark's approval for the burglary of a consulate.

July 21, 1975 For at least the past 5 years, agents of the FBI and the NSA were "authorized" by U.S. Attorneys General to monitor overseas cable traffic in violation of the Federal Communications Act, which makes divulging the "existence or contents" of telegraph and telephone messages a federal crime. According to a copyright story in the *New York Daily News*, federal agents, however, paid the employees of at least one company for their assistance in gaining access to the cables.

August 4, 1975 The House Intelligence Committee under new chairman Otis Pike launched its investigation with a series of public hearings focused on intelligence community budgets. CIA director William Colby gave the committee a budget run-down in secret but refused to make the numbers public primarily on grounds that once the overall numbers are public additional information would be demanded. (The Project has a lawsuit pending under the Freedom of Information Act demanding public release of the CIA budget.)

The Committee took the first public testimony ever given by a Director of the still super secret National Security Agency. General Adler told the committee that NSA was not governed by the *Zweibon* decision which bans warrantless wiretaps of American citizens not agents of foreign powers since his Agency was gathering foreign intelligence information. Colby conceded that NSA may inadvertently intercept the overseas communications of American citizens.

August 13, 1975 Attorney General Edward Levi in an address before the American Bar Association Convention revealed that a Justice Department committee was developing guidelines for FBI operations in various areas including investigations to obtain domestic intelligence. He stated that "the proposed guidelines would limit domestic intelligence activities to the pursuit of information about activities that may involve the use of force or violence in violation of federal law in specified ways."

In The Courts

July 22, 1975 *Driver v. Helms*, Civ. Action #75-0224. The American Civil Liberties Union filed a class action suit in the U.S. District Court in Providence, Rhode Island on behalf of Rodney Driver and other Americans whose mail to and from various foreign countries had been opened by the CIA.

July 23, 1975 *U.S. v. Grunden*, ACM 21679, on appeal to the USAF Court of Military Review was filed by the ACLU. Grunden was tried and convicted by general court martial for espionage under 18 U.S. §793(d). The appeal asks for reversal on several grounds including: whether the espionage statute is unconstitutionally vague and overbroad in general or in this case because the judge failed to instruct the jury that conviction requires a showing of intent to injure; that the judge failed to instruct the jury that whether classified documents actually related to the "national defense" could not be based on the fact of classification; and whether defendant was denied due process because of restrictions on his attorneys' access to classified material.

July 28, 1975 *Washington Mobilization Committee v. Wilson*, Civ.Action #779-70(D.D.C.). U.S. District Judge Waddy held that the D.C. police department has consistently engaged in a pattern of unlawful arrests, unjustified violence, unlawfully prolonged detention, and denial of access to phones, counsel, and medical care. The Court declared unconstitutional (1) the use of the police line ordinance and police sweeps and (2) arrests without contemporaneous recording of time, place, reasons, and arresting officer.

Aug. 11, 1975 *Algonquin SNG, Inc. v. F.E.A.*, #75-1202 (D.C. Cir. 1975). Held that Congress had not delegated authority to impose a fee on oil imports and that in the absence of such delegation the President lacks authority to require license fees. "Neither the term 'national security' nor 'emergency' is a talisman, the thaumaturgic invocation of which should, *ipso facto*, suspend the normal checks and balances on each branch of government. Our laws were not established merely to be followed only when times are tranquil. If our system is to survive, we must respond to even the most difficult of problems in a manner consistent with the limitations placed upon the Congress, the President, and the Courts by our Constitution and our laws." The Justice Department has appealed to the Supreme Court.

In The Congress

The current status of relevant legislation is described in the article on p. 3.

National Security and Civil Liberties: The Situation, The State of the Current Law, and Legislative Action

BY CHRISTINE M. MARWICK

THE ALMOST OVERWHELMING DOCUMENTATION of abuses of power at home and abroad, justified by "national security" claims and covered by a cloak of secrecy, is far too extensive and too well-known to be more than mentioned in passing here. Our focus in this first issue of First Principles is instead on a general overview of the situation and current law, with a look at some of the legislative action currently under consideration. The major civil liberties issues fall into three general and often overlapping areas. First, the right of citizens to be informed about what is actually going on; second, the right of citizens to follow their informed political opinions to lawful political action; and third, to do so free from government surveillance and interference.

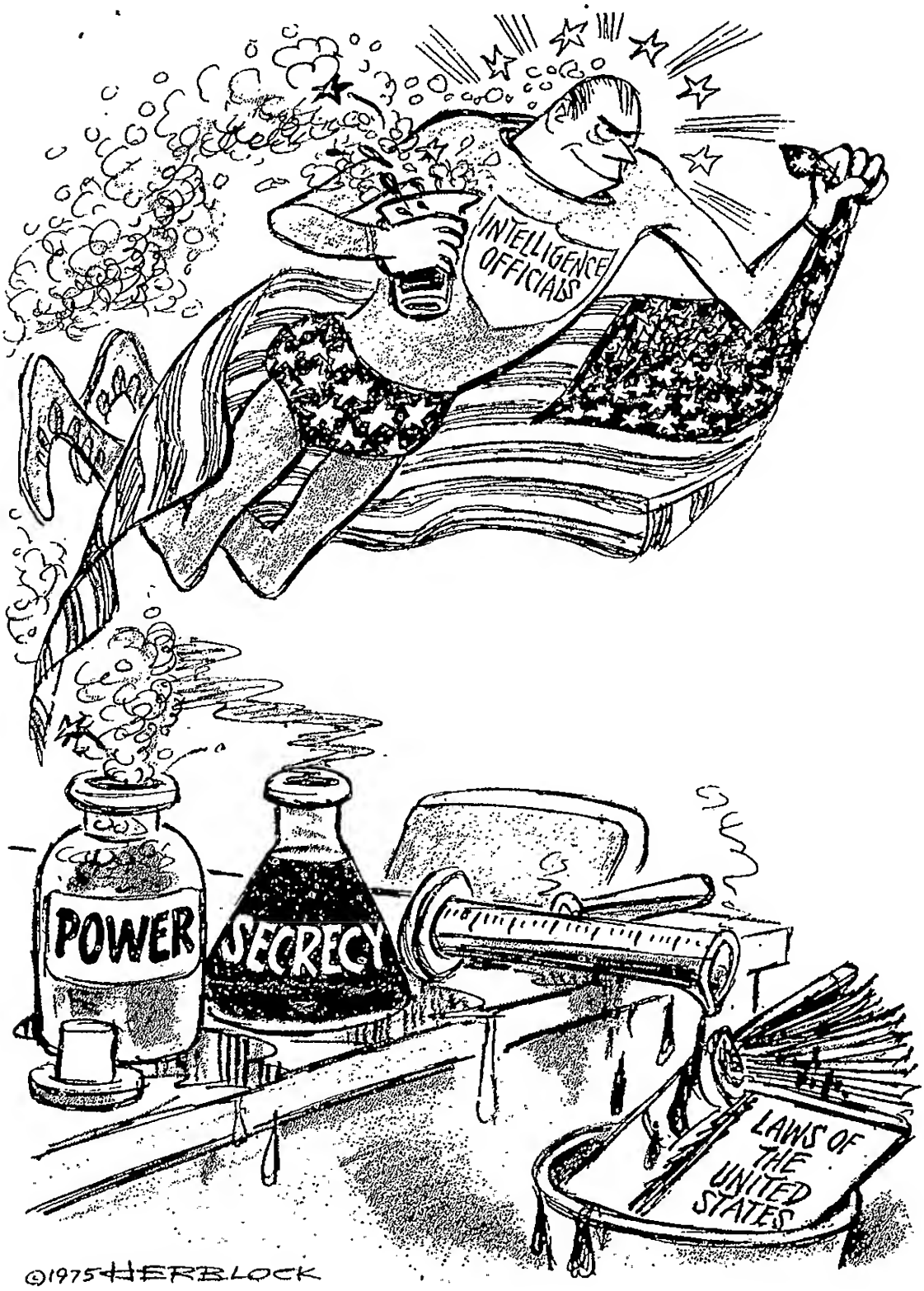
CLASSIFICATION: THE SECRECY SYSTEM

There is said to be a sign hanging in the offices of the Justice Department reviewing Freedom of Information Act requests which reads: "When in Doubt/Cross it Out." Apocryphal or not, this sign is representative of the current classification system — arbitrary and arrogant of the public's right to an informed opinion.

The authority to classify currently rests on Executive Order 11652, which was issued by Richard Nixon after the publication of the Pentagon Papers brought the fact of massive over-classification to public awareness. The Executive Order does not, however, change anything. There is no recognition of the public's right to know or of the need in a democracy for informed public debate on policy. The standards are extremely vague as written and nebulous as practiced. As some of the FOIA litigations brought on behalf of the Project on National Securities and Civil Liberties is bringing out, executive branch officials themselves have only vague notions of what the classification criteria in E.O. 11652 are. In practice, the fact that the system rests on an executive order seems to imply a carte blanche executive discretion rather than an affirmative obligation to the public to release information — the operative principle seems to be whether or not the information will encourage public support of an agency's policies.

It is acknowledged that the system cries out for reform. The discussion turns on what those reforms should be. Given that secrecy frees the executive branch from having to defend its policies, it is difficult to accept at face value executive claims that it is the only competent judge of what must be kept secret. A classification system, that would accurately reflect the national interests must not only keep secret that small amount of information whose release would damage the national security. It must balance against claims of secrecy the need of the Congress and the public for information that is necessary for

Hallucinatory Drug Formula



—copyright 1975 by Herblock in The Washington Post

meaningful public debate. Most importantly, there must be a return to the principle that the people are not anti-government agents — they are the nation.

There is a growing consensus on the need for a legislated classification system. The Commission on the Organization of the Government for the Conduct of Foreign Policy (also known as the "Murphy Commission"), which draws very conservative conclusions on other foreign policy issues, advocates in its report that Congress legislate a classification system which would include a review of classified material by a group independent of the executive interests and which would require the mandatory release of certain categories of information.

Thus far, congressional action on the issue has not gathered momentum. Responsibility for reform of the classification system is in the Muskie subcommittee of the Senate Government Operations Committee and the House Subcommittee on Government Information and Individual Rights of its Committee on Government Operations, now chaired by Rep. Bella Abzug. The latter subcommittee is focusing its energies for the time being on oversight of the Justice Department and privacy issues. Neither Chairman has introduced a bill or scheduled hearings.

THE FREEDOM OF INFORMATION ACT

The amendments to the Freedom of Information Act, which went into effect on February 19, 1975, make it possible for the first time to use the FOIA to request information kept secret by the national security agencies. Upon receiving a request for a particular file, the agency must conduct a declassification review to determine if the information is currently classified, it must respond to any request which reasonably describes a document, and it must release "reasonably segregable" portions even if there is some properly classified information in the document. Responses to requests must be within a brief specified period and fees may not be charged for reviewing a document to determine which parts may be withheld. (Fees may still be charged for searching and copying.)

If an Agency refuses to release a requested document, a suit may be filed in federal district court. The court must determine for itself that the information is properly classified and may examine the document to make that decision.

The (b) (1) exemption which permits the withholding of national security information now reads that such information may be withheld only if it is:

(a) specifically authorized under criteria established by executive order to be kept secret in the interests of national defense and foreign policy, and (b) are in fact properly classified pursuant to such executive order.

The criteria in Executive Order 11652 is whether disclosure "could reasonably be expected to cause damage to the national security." While this is a great improvement over the provisions of the 1967 Act which permitted the withholding of any document stamped classified regardless of its contents, nevertheless, it does not permit weighing the public's needs to know against the asserted damage. The degree of possible damage is not taken into account — any amount or any kind of "damage" is enough to keep the information secret, even in situations where there is a very strong need for public debate.

The most popular use for the Act has been asking for personal files, mainly from the FBI and the CIA. The Project has published a pamphlet to guide people in using the Act to request their files. Agency costs generally range between $10 and $50, depending on whether you ask only for your own file or also for cross references of your name in other people's files. The CIA waives fees in most cases of requests for personal files.

The Justice Department has recently suggested that it is going to interpret the Privacy Act, which goes into effect on September 29th and which exempts the CIA or all investigatory files, as precluding the use of the Freedom of Information Act to request personal files. This extraordinary exegesis runs counter to the intent of the Privacy Act. The Freedom of Information Clearinghouse, a Nader group, plans to make an early court test of this if the agencies follow through on this interpretation.

One major focus of the Project on National Security and Civil Liberties has been using the FOIA to obtain national security information, especially as it relates to the secrecy system itself or to threats to civil liberties. Some forty-plus requests have been made by the Project. A number of important documents have been released, including the Negotiating Volumes of the Pentagon Papers (in part), the Colby Report to President Ford on CIA domestic activities, and other CIA documents on the Agency's domestic activities. A listing of "Abstracts of Documents Released" to the Project and a selection of documents released to others is available for $1.40. The Project's pamphlet on using the Act to obtain information relating to national security, "The New Freedom of Information Act and National Security Secrecy," is also available. An order blank has been included in the newsletter for Project publications.

To date, six lawsuits have been filed on behalf of the Project under the provisions of the FOIA to compel the release of information (suits are brought by the ACLU unless otherwise indicated):

Halperin v. State, Civ. Action #75-0674, to compel the release of deletions from a Kissinger press backgrounder dealing with SALT;
Halperin v. Colby, Civ. Action #75-0677, for the Colby Report to President Ford on CIA activities, filed by William Dobrovir; the suit has been largely successful and is now being pressed for legal fees and possible sanctions for arbitrary withholding;
Halperin v. Colby, Civ. Action #75-0676, to release the CIA budget figures for FY 76 and expenditures for FY 74;
Halperin v. National Security Council, Civ. Action #75-0675, to release the titles of National Security Study Memoranda (NSSMs) and Decision Memoranda (NSDMs) (Freedom of Information Clearinghouse case);
Borosage v. CIA, Civ. Action #75-0944, to release the materials given to the Rockefeller Commission on CIA assassinations;
Klaus v. National Security Council, Civ. Action #75-1093, to release National Security Actions 10 and 10/2, the presidential memoranda establishing the National Security Agency, and all NSCIDs (National Security Intelligence Directives) since 1948.

The Freedom of Information Clearinghouse, in addition to handling the *Halperin v. NSC* suit above, has also filed two other suits for which the (b)(1) national security exemption was claimed:

St. Louis Post-Dispatch and Richard Dudman v. FBI, #75-1025, to release information about FBI counterintelligence activities over the past 10 years which were directed at the Post-Dispatch or Dudman personally;
Phillipi v. CIA, #75-1265, a *Rolling Stone* reporter's suit for records of the CIA personnel suppressing information on the Glomar project (the CIA insists that they can neither confirm nor deny their role).

All the FOIA cases are in various stages of discovery; First Principles will cover their progress through the courts.

ESPIONAGE

Buried within S. 1 — the massive administration bill intended to codify and reform the present hodge-podge of federal criminal statutes — are a series of provisions which, if enacted, would radically broaden the scope of the espionage law and produce an Official Secrets Act.

That the present espionage law is in desperate need of clarification is undisputed. As the Ellsberg indictment showed, it can be interpreted to mean virtually anything. The espionage provisions in S. 1, however, deal with the problem not by tightening the statute but by broadening it to include almost everything: "A person is guilty of an offense if, knowing that national defense information may be used to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power," he "obtains or collects such information, knowing that it may be communicated to a foreign power." The full scope of such vague and expansive phrases as "may be used to the prejudice . . . of the United States" and "may be [ultimately] communicated power" is such that virtually any discussion which included *any* information, however harmless but which *might* somehow "prejudice" the "interests" of the national defense and foreign policy, could be prosecuted as espionage.

The espionage section is followed by three additional offenses which add up to an Official Secrets Act: Disclosing National Defense Information, Mishandling National Defense Information, and Disclosing Classified Information. Taken together, any government official communicating "classified information" or "information relating to the national defense" to anyone not authorized to receive it, whether or not the information was properly classified or could potentially injure the United States, would be guilty of a felony.

At this point the future of S. 1 is unclear. In the House, H.R. 3907, an identical bill, is sitting in the Subcommittee on Criminal Justice; no action is pending or scheduled as of yet. In the Senate, a report is expected from the Subcommittee on Criminal Laws in September, with the bill then going before the full Committee.

In August, two major shifts in the support behind S. 1 took place: Sen. Roman Hruska came out in favor of revising the provisions of the bill to require an intent to injure and to cover only vital information; Sen. Birch Bayh, citing the same criticisms as well as others, withdrew his sponsorship of the bill.

An alternative to S. 1 and H.R. 3907 has been submitted by Rep. Robert W. Kastenmeier in H.R. 333 which is the reform of the federal criminal code as proposed by the Brown Commission itself. It has, however, no companion bill in the Senate and no action has so far been scheduled.

PRIOR RESTRAINT

The right of the government to impose prior restraints on publication of material dealing with political issues has become a reality in the little-publicized case of Victor Marchetti, a former CIA official.

In *U.S. v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), the District and Appeals courts held that Marchetti had waived his First Amendment rights for life in his employment contract with the CIA. A permanent injunction has been issued against him which requires that he submit to the CIA for

censorship "any manuscript, article, or essay, or other writing, factual, fictional or otherwise, which relates to or purports to relate to the Central Intelligence Agency, intelligence activities, or intelligence sources and methods."

Following this injunction, Marchetti and his co-author, John Marks, submitted their book, *The CIA and the Cult of Intelligence* (Knopf: New York, 1974), to the CIA — the result is the first politically censored book in the history of the United States.

In *Knopf v. Colby*, 509 F.2d 1362 (4th Cir. 1975) the Fourth Circuit had ruled that Marchetti and Marks were not entitled even to write about matters which had already entered the public domain; such a discussion might constitute a "confirmation" of what had been merely rumor and speculation before. It was decided, however, that the FOIA could provide relief: "these plaintiffs should not be denied the right to publish information which any citizen could compel the CIA to produce and, after production, could publish." The case has now been sent back to Judge Bryan of the District Court for consideration under the provisions of the FOIA; no order has been issued yet.

In response to the Marchetti cases, Rep. Jonathan B. Bingham introduced on July 21st a bill to control this new encroachment on First Amendment freedoms. H.R. 8791 provides that no contract can be the basis for curtailing free speech. The only criteria for prior restraint would be if "such matter will surely result in direct, immediate and irreparable damage to the security of the United States or its people."

On the other side, the Director of Central Intelligence, William Colby, threatened to seek a court order preventing the publication of Philip Agee's account of his career as a CIA operative, *Inside the Company*. That threat failed and the book is now available (see review on p. 13), but the threat of injunction or indictment has thus far prevented Agee from returning to the United States. Colby also has had legislation drafted which would authorize prior restraints on CIA officials. This bill, however, is still waiting for approval in the Office of Management and Budget and has not yet been sent to the Congress.

NATIONAL SECURITY SURVEILLANCE

National security wiretaps and other forms of surveillance are another area in which the needs of national security and civil liberties have yet to find a balance.

In *U.S. v. U.S. District Court*, 407 U.S. 297 (1972), generally known as the *Keith* case, the Supreme Court held that the President had no right to wiretap without a warrant in domestic security cases. It left open the question of surveillance of foreign powers and their "agents," defining the latter as those with a significant connection with foreign powers.

On June 23, 1975 the Court of Appeals for the District of Columbia held in a case involving the Jewish Defense League that: "A warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration with a foreign power, even if the surveillance is installed on presidential directive in the name of foreign intelligence gathering for the protection of national security." *Zweibon v. Mitchell*, 516 F.2d 594.

President Ford directed the Justice Department to obey this decision throughout the country pending a decision on whether to appeal to the Supreme Court. Attorney General Levi has since stated that there were no surveillances without warrants directed against American citizens and that none would be installed except against agents of foreign powers. There is however considerable ambiguity about the definition of "agent," and warrantless taps continue against embassies and alien employees of foreign governments. The *Zweibon* court suggested that such taps would require a warrant but two other circuit courts of appeals have held that they do not. This subject will be treated in more depth in our next issue.

There are two bills currently on the Hill which are focused at providing legislated safeguards on wiretapping and other surveillance. The Kennedy-Nelson Bill, S. 743, would limit wiretapping of American citizens to situations in which a warrant has been issued based on a showing of probable cause. Taps on embassies and foreign personnel would also require warrants, but under a more relaxed standard. Hearings on S. 743 are scheduled for Fall, 1975. The Bill of Rights Procedures Act, introduced in the Senate by Sen. Mathias as S. 1888 and in the House by Rep. Charles Mosher as H.R. 214, is a more comprehensive effort to protect Fourth Amendment rights and also has the support of Senators Kennedy and Nelson. Its provisions include not only wiretapping, but also mail opening, third party records (bank, credit, medical, etc.), entry of dwellings, and other aspects of surveillance. It does not cover, however, the use of informers and agent provocateurs. To enforce these restrictions, the Mathias-Mosher bill provides for individual culpability of officials. The Bill of Rights Procedures Act is expected to have House Subcommittee hearings in September and Committee action in October.

COVERT OPERATIONS

One of the starkest threats to civil liberties at home has been the domestic use of the tactics

developed in covert intelligence operations abroad. While everyone knew that the government overclassified information and had some "national security wiretaps," the full range of covert action at home and abroad came as a shock to the public.

A series of Supreme Court decisions over the years have made it clear that the constitutional protections do not apply to foreigners abroad. With Congress' Cold War attitude of abdicating much of its responsibility in foreign affairs, the intelligence agencies were virtually given carte blanche to conduct secret, extensive operations which at home would have violated constitutional rights.

What did come as a surprise to the public, however, was that the techniques perfected against foreign powers had since been turned to covert operations in the United States. Civil liberties are especially vulnerable — there are neither laws nor judicial decisions controlling the use of informers or operatives even in domestic situations, cf. *Hoffa v. United States*, 385 U.S. 293 (1966). Both informers and agent provocateurs have been used repeatedly, systematically, and flagrantly by the CIA's Operation CHAOS and the FBI's Cointelpro. Nor has any distinction been made between the investigation of specific crimes and the investigation of lawful political activities. And, ultimately, it has turned out that the attitude toward elections in foreign nations was extended to the electoral process at home; the FBI's Cointelpro made use of a variety of techniques to influence elections at home. Watergate merely extended this attitude into the White House and against a major political party.

Both the Senate and the House have select committees investigating the activities of the intelligence agencies — the CIA, the FBI, the NSA, and others. Thus far the Senate Select Committee has been holding hearings in executive session investigating the assassination of foreign leaders; a report is scheduled to be issued in September. Its mandate, which originally was to run to the end of August, has been extended to February 29th, which will allow it to turn to covert operations abroad and presumably to other aspects of its very broad charter.

The House Committee has held public and secret hearings on the budgets of the intelligence organizations; these hearings will eventually be printed. What it will turn to next is not yet determined.

When these committees finish their investigations Congress will be faced with the question of how to control future abuses by the intelligence community. First Principles will keep you informed.

Bibliography

Emerson, Thomas I.; Haber, David; Dorsen, Norman, *Political and Civil Rights in the United States*, (Little Brown: Boston, 1967); *1974 Supplement* (1974).

"Developments in the Law — The National Security Interest and Civil Liberties," 85 *Harvard Law Review* 1130 (April 1972).

(We list here only two general works. As we discuss each topic in detail we will provide a bibliography of major works).

The Principal Unlearned Lesson of Watergate: The Need For a Responsible Presidency

BY PHILIP B. KURLAND

We are beginning to celebrate the bicentenary of the Declaration of Independence. But I would remind you that this nation was not born in 1776, it was born in 1787 with the American Constitution. And before we can celebrate the bicentennial of the American Constitution, we must successfully get past "1984." If I were in charge of some bicentennial celebration this year, I would require the participants to read George Orwell's "1984" to show what the new nation was created to avoid. I would be fearful, however, that some of our leaders might treat it as the Germans did "Mein Kampf," as a blueprint for action rather than as an *Inferno* to be avoided.

It is hard for me to accept the fact that it was a bare ten months ago that a President of the United States was forced to resign his office because of abuse of power by him and his administration. The successor in office, after pardoning his predecessor, has behaved as if the events of Watergate never occurred. Except that he did refer to them, though not by name, in his recent speech at Brussels, treating Watergate as if it were Yorktown or Gettysburg or Okinawa, as a great battle thought to have been won.

Like Nixon, President Ford has asked us to look forward and not backward, to forget — indeed, to ignore — the evils that occurred, to view the pardon he so generously granted to Mr. Nixon as if it wiped out not only the former President's criminal liability but also the deeds that gave rise to that liability.

Unlike Mr. Nixon, President Ford has been rather successful in this effort. So successful that he has invoked the same processes with respect to the Viet Nam war as with Watergate. And, I expect this success is due to the fact that none of us likes to recall pain and unpleasantness. Moreover, the press, the mother of Watergate, has lost interest in it, for its primary concerns, as always, are not with the principles of government, but with scandal. This leaves a large responsibility to attend to the problems of the governance of a nation dedicated to "liberty and justice for all." For nothing is clearer than the fact that the events of Watergate demonstrated real and continuing dangers to American freedom and justice.

There were two principal aspects of Watergate: one personal, the other institutional. The first was concerned with the removal from office and punishment of those who committed Watergate crimes. Since almost all of the Watergate culprits from Mr. Nixon down have been granted clemency, I would say no more of those personal derelictions than to quote John Stuart Mill's dictum: "As for charity, it is a matter in which the immediate effect on the persons directly concerned, and the ultimate consequences to the general good, are apt to be at complete war with one another."

Watergate, however, revealed more than the weaknesses of evil men in high places. Watergate revealed basic institutional deficiencies that have not and will not be corrected unless and until an

Mr. Kurland is Professor of Constitutional Law at the University of Chicago. The following article is excerpted from a speech before the Annual Meeting of the Delaware Bar Association.

aroused American public or an aroused Congress *demands and secures reform.*

I must concede that there are many whom I respect who would deny even the existence of institutional problems, who believe that the transgressions of "the White House" and the Nixon Administration, were merely personal malfactions and that the removal and replacement of evil men has cured the disease. That is what the Attorney General of the United States said, in effect, to a University of Chicago Law School Alumni meeting. He spoke of Watergate — without ever mentioning the word — as if it were a series of minor peccadilloes by slightly aberrant officeholders demonstrating a few errors of judgment that had been blown out of proportion by a sensational press. Trust us, was the message, for we truly have your interests at heart and unless there is faith in government, government cannot function.

Certainly that last proposition is right, but the implied equation of government with the executive branch or the Presidency is in error. Indeed, it is the error on which Watergate was predicated. And if there is to be a return of faith in government, it will come only after it is earned, not merely because it is solicited.

There are others than Administration spokesmen who think Watergate was a problem of deficiencies of men and not of institutions. Lawrence O'Brien is typical of some political attitudes on the Democratic side, and a myriad of newsmen, including the prestigious James Reston, seem to think the same. They would have us believe that the abuses were idiosyncratic to the Nixon regime and will not be repeated so long as the proper men exercise the presidential prerogatives. But they do not tell us how to choose these Platonic Guardians.

Perhaps they should read Ben Bradlee's book about Kennedy, or, more to the point, George Reedy's morality tale about the White House, introduced with these words:

> It is not that the people who compose the menage are any worse than any other collection of human beings. It is rather that the White House is an ideal cloak for intrigue, pomposity, and ambition. No nation of free men should ever permit itself to be governed from a hallowed shrine where the meanest lust for power can be sanctified and the dullest wit greeted with reverential awe . . . . It is not enough to say that the White House need not be like this if it is occupied by another set of personalities . . . . The fact remains that the institution provides camouflage for all that is petty and nasty in human beings, and enables a clown or a knave to pose as Gallahad and be treated with deference.

Article II, §1 provides that: "The executive power shall be vested in a President of the United States of America." From these few words, the incumbents of the office have constructed a license for power and authority that would have astounded a medieval king of England, no less a Stuart or a Hanover. Certainly, from Franklin Delano Roosevelt to Gerald Ford, the Presidents of the United States have found in these words an ever broadening charter to be the sole legitimate custodian of national sovereignty. And when the origin and meaning of the words cannot be construed to this end, reliance is placed on successful usurpations by their predecessors which, like bricks and mortar, have been put together one by one to build the magnificent edifice that is "the Presidency." It is not only an edifice but, as George Reedy has said, a shrine, at which all of us are expected to pay homage and fealty, as most of us have in fact done.

Of course, I do not deny the importance of the individual qualities of the officeholder to the performance of his task. I would not deny Burke's statement that "The laws reach but a little way. Constitute a government how you please, infinitely the greater part of it must depend upon the exercise of the powers which are left at large to the prudence and uprightness of ministers of state." But I would qualify it, the way Madison did when he wrote the familiar words of the 51st *Federalist:*

> If men were angels, no government would be necessary. If angels were to govern men, neithe external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but *experience has taught mankind the necessity for* auxiliary precautions.

The real problem of the post-Watergate era, however, is not to assign blame for the creation of the imperial presidency. Nor should the objective of reform be the destruction of legitimate and necessary presidential power. The problem is, rather, to provide those "auxiliary precautions" of which Madison spoke, that will make the exercise of presidential authority responsible to "We, the people." Some of these proposed "auxiliary precautions" are the subjects of my consideration here.

The first is the suggestion that responsibility to the people is fulfilled by the election process and tinkering with that will do the trick. The responsibility of a quadrennial election is not enough to assure such responsibility, for at least two reasons First, the period between elections is too long, too

much damage can be done to the fabric of our society between elections. Certainly this is evident from the events of Watergate and of the Viet Nam war. Second, there can be no real accountability, even at an election, when the actions of the administration have been shrouded in secrecy, so that the public never knows what miners and sappers have been at work at the substance of a free society. This again is a clear lesson from recent events. But some would nevertheless tinker with the presidential election process by a constitutional amendment for direct popular elections, or a constitutional amendment for national presidential primaries, or a constitutional amendment to provide for election of the Vice-President by the people rather than by the Congress when that office becomes vacant, or any combination thereof. I don't believe that any of these addresses our fundamental problem. And, indeed, they may well divert attention from the real issues.

Legislation by way of a new reorganization act may be the appropriate answer to another problem of governmental irresponsibility. There is significance to the fact that the chief executive is no longer regarded as an individual but as a staff or an institution. The appropriate word is no longer "the President" but "the Presidency," which includes a very large number of individuals indeed. And once again the Watergate episode affords necessary information about the abuses that have resulted from this distortion of the constitutional concept.

There are at least two cancerous growths on the American body politic. One of these is the burgeoning power of the executive branch. The other has occurred within the executive branch itself, where power has shifted from the Departments and old line agencies to what is called "the Executive Office of the President." In fact, it is here that all government policy is made, and except for the President himself — and in the case of Mr. Ford, including the President himself — the wielders of that power are all unelected, and with little or no responsibility to Congress except through the appropriations processes. And in any event, the appropriations processes are under greater control of the Office of Management and Budget than of the Congress. Perhaps this will be changed through the new budget committees in the two Houses, but that remains to be seen.

The Executive Office of the President is made up first and foremost of "the White House," some three dozen-plus barons and their entourages, reminiscent of the "fourth branch of government" described by Bernard Bailyn as affording one of the primary causes of the American Revolution whose bicentenary we are now celebrating. The White House office is not merely an enlarged version of the six presidential counselors provided for by the Reorganization Act of 1939, although its antecedents are to be found there. These officers are not merely means of communications between the President and the old-line agencies and departments. They are the overlords of the executive branch.

The White House office shares some power with other branches of the Executive Office, particularly the Office of Management and Budget, the Council of Economic Advisers, the Central Intelligence Agency, the Council on Environmental Quality, the Council on International Economic Policy, and the Federal Energy Office. It is here, in the Executive Office of the President, that "the Presidency" is to be found.

There are perhaps two ways of solving the problem of lack of responsibility of "the Presidency," of these governors of the American people. The first, which I would prefer, would be to dissolve these agencies and distribute their powers and authorities among the old-line agencies and departments which are creatures of the Congress and can be made accountable to the Congress. The second is to attempt to make these branches of the government directly responsible to Congress, although leaving them with their present authority. And among the ways to create such responsibility is to see that all the major domos in the Executive Office are required to have the approval of the Senate before they assume control of their fiefdoms.

If nonresponsibility is the basic problem, it is most seriously demonstrated by the so-called "intelligence agencies" of our government. Aside from the presidential tapes themselves, the most startling revelations of the Watergate period were the hints of the perversion of these intelligence forces into political police forces. And certainly twentieth century history suggests that the greatest threats to an open, democratic society derive from a political police and an unresponsible military.

It is of quintessential importance, therefore, that our intelligence and counterintelligence agencies be confined and restricted to the limited functions they were created to deal with. Once again we are met with the proposition that we should be satisfied that these agencies will exercise self-restraint so that no accountability is really required. But too much has been revealed of the activities of these forces to permit any confidence in that self-restraint. The very personnel of Watergate, connected as they were with the C.I.A., certainly raises doubts. And one need not treat as gospel such books as Wise & Ross, *The Invisible Government* or Marchetti & Marks, *The CIA and the Cult of Intelligence* to exacerbate those fears. Indeed, there is a work that purports to be fiction, Ward Just's *The Congressman Who Loved Flaubert*, that is sufficient to raise one's hackles.

There is, of course, at the moment a series of

Congressional and Presidential investigations into the activities of the intelligence agencies. One can have no confidence in the Rockefeller Commission's efforts which, so far, at least, have all the hallmarks of a cover-up. The Senate and House investigations have not even gotten off the ground and they are being frustrated by the refusal of the agencies to make available to Congress the data about their own activities. The cry is, as it was in Watergate, "national security." The argument is that the agencies feel that Congress cannot be trusted with the relevant data, but that Congress should trust functionaries of the agencies.

If oversight by Congress is not to be the answer, it is hard to conceive of an answer. The present pattern of disclosure is a familiar one. Facts slip out about malfactions within the intelligence services. First, they are denied. Next, they are grudgingly conceded. Then, there is a plea for secrecy against further revelations on the ground of "national security." One may well ask whether the interests of the nation's security as a democratic polity are more likely to be protected by openness, at least with regard to past behavior if not present activities, than by a trust in the virtues of those who have proved to lack virtue.

It is only through an agile and exercised press that we have had any information about the scope of the efforts of our intelligence agencies. Grateful as we should be to the press, we must accept the fact that the press is a necessary but not a sufficient safeguard against a dreaded politicization of intelligence services.

This brings up the fact that in recent years the government cloak of secrecy has been erected into an impenetrable screen by the assertion of "executive privilege." One need not go so far as Prof. Raoul Berger did in his volume on *Executive Privilege*, to recognize that the doctrine, of recent growth, is a tool for the preclusion of the power of legislative oversight, which is the only real check on abuse of executive power. It is a real check, that is, to the extent that Congress is faithful to its task. Recent history — Watergate aside — doesn't suggest that this authority will necessarily be asserted.

Watergate has left us a legacy here, too. For the Supreme Court of the United States, in the form of a decision in *Nixon v. United States*, has created out of whole cloth a privilege of constitutional stature, a privilege apparently breachable only by the judiciary itself for the purpose of carrying on its criminal processes. Having created the privilege, the Court abstained from saying whether Congress could assert for its purposes the power to breach the privilege that the Court asserted for its own ends.

Again, Senator Ervin had, as chairman of the Separation of Powers Subcommittee, long before the events of Watergate, investigated the problem of executive privilege. Hearings in 1971, entitled *Executive Privilege: The Withholding of Information by the Executive*, addressed the problem of a statutory definition for a theretofore much-abused notion of secrecy. The subject of the hearings was a draft bill, S. 1125, which would have defined the conditions under which the privilege could be asserted.

Since I believe that there is no basis in the Constitution for such a privilege, and since I believe that there is no warrant in the creation of such a privilege by judicial fiat, and since I believe that there are times when such a privilege should exist, I believe that pursuant to its authority: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," Congress should provide a statutory definition of executive privilege and a statutory definition of the appropriate procedures. These are necessary conditions to the reality of responsibility of the executive branch to the people through the Congress.

The subject of executive responsibility is, of course, far too vast for resolution here. The subject is also far too important not to receive the attention of every organ of responsible scrutiny concerned with the maintenance of our democracy.

I am reminded, however, of a recent penetrating column by Russell Baker in *The New York Times Magazine* for May 25, 1975. It began with these words: "The Government is acting as if it wants a divorce. Signs of its disaffection have been multiplying ever since President Nixon said we had to be treated like children, and there is increasing evidence since the Vietnam collapse that unless we shape up soon the Government is going to pack up and move out on us, taking its talents to more deserving people elsewhere."

Baker's piece concluded, as I would conclude here: "We must be very careful about saying these things. The Government is nearing the end of its patience. It may become totally disgusted with us. We would not want the Government to pick up and leave us, would we?" Or would we?

King John had his Magna Carta; King Charles had his Bill of Rights; King George III had his American Constitution, and the Nixon Administration should have no less glorious a monument to reform.

Inside the Company: CIA Diary

In The Literature
BOOK REVIEW

BY PHILIP AGEE, STONEHILL, 639 pp., $9.95

IN THE ALMOST 30 years that the CIA has been sending agents abroad, only Philip Agee has come in from the cold. While Marks and Marchetti gave us in *The CIA and the Cult of Intelligence* a (literally) censored view from headquarters, it is only from this volume that we hear directly from a real agent what life is like in a CIA station in countries whose internal affairs we are bound by treaty to leave alone. We learn in devastating detail what is done in the name of the United States in the three Latin American countries in which Agee was assigned during the 1960's — Ecuador, Uruguay, and Mexico.

The book, to be sure, is long and sometimes tedious. It tells the reader more than he wants to know about the internal politics of Ecuador and Uruguay. Some will also be jarred by the author's gropings toward a socialist ideology as the diary unfolds. All this and more must be endured — for it is only by immersing oneself in the details of the book that one can come to an understanding of what it means concretely for the United States to recruit and send abroad a career covert intelligence service.

We learn, for example, how little control Washington — the Agency, the Forty Committee, and the President (in descending order of influence) — really has on what is done.

Take for example Uruguay, a country most Americans would be hard put to find on a map, a country with a relatively open and free political system, and a country which poses not the slightest threat to American security. What is done by the CIA in Uruguay is governed by the Related Missions Directive (RMD), which is apparently approved by the Forty Committee. When Agee was sent to Montevideo in 1964 the Uruguayan government had not yet fallen into line with the American policy of ostracizing Cuba. Thus the first priority in the RMD operations was directed at securing a break in Cuban-Uruguayan relations. Agee and his colleagues engaged in an incredible series of operations:

— The station penetrated most of the political organizations, including the Communist Party. It had a telephone tapping operation, a surveillance team following Cuban and Soviet diplomats, and an agent in the telegraph company who provided copies of encoded telegrams sent by the Soviet bloc. A letter carrier was recruited to divert for surreptitious opening mail addressed to a suspected Cuban agent. A Foreign Ministry official provided copies of pictures of bloc diplomats.

— The station supported and directed the writing of articles published as unsigned newspaper editorials. When an attempt to recruit a Cuban diplomat failed, it was portrayed to the local press as a forced return to Havana. Fake documents were produced and leaked to the press. Phony reports were prepared for government officials to use as their own in "detailing" Soviet interference in Uruguay's internal affairs.

All of this and more was directed at breaking relations with Cuba and, when that was achieved, toward expulsion of the Soviet mission and preventing left wing parties from coming to power.

Much attention of late has focused on CIA operations abroad. But as Agee's study of activities in developing countries makes clear, the line between intelligence gathering and covert operations is a difficult one to draw, and the one tends to justify the other. Many of the worst actions are simple information gathering escapades which break the laws of the host nations as well as our own official commitment to stay out of their internal affairs. Agents recruited to gather information will seek and be given advice on what to do; even if covert operations as such were prohibited, agents realize that following this advice to its logical conclusion will help advance their careers.

It is impossible to read this book without coming to understand the origins of Watergate. Every dirty trick and illegal act which was turned on the American people had long been practiced on our allies.

The only way to stop all of this is to dissolve the CIA covert career service and to bar the CIA from at least developing and allied nations. Agee's account alone should be enough, but one suspects that Congress will want more before it is prepared to act. The special intelligence committees have been set to work at that task so that we all can understand what the Company does in our name abroad.

—Morton H. Halperin

In The Literature

continued

Magazines

"The Kennedy Vendetta: An Account of the CIA's Secret War Against Cuba," by Taylor Branch and George Crile III, *Harpers*, August 1975, p. 49.

Government Publications

Colby Report to President Ford on CIA Activities Within the United States, December 24, 1974. Available from the Office of the Assistant to the Director, Central Intelligence Agency, Washington, D.C. 20505.

Report to the President by the Commission on CIA Activities Within the United States, June 1975 (Government Printing Office Stock Number 041-015-00074-8: $2.85) (The Rockefeller Commission Report).

Electronic Surveillance for National Security Purposes, Hearings before the Subcommittees on Criminal Laws and Procedures and Constitutional Rights of the Committee on the Judiciary, United States Senate, 93rd Senate, 2nd Session, on S. 2820, S. 3440, and S. 4062, October 1, 2, and 3, 1974.

continued from page 16

When the Supreme Court refused to enjoin publication and the case moved into a criminal phase, I found myself more and more actively involved as a consultant to Ellsberg's defense lawyers. I ended up spending some five months in Los Angeles at the trial getting my first exposure (beyond Perry Mason) to a court of law and at at the same time coming to understand how dangerous it would be to permit the government to monopolize all of the "national security" expertise in a case involving a clash of interests. From there it was a short step to becoming an expert witness and consultant in the *Marchetti* case.

Then came the news of the 21-month wiretap of my home telephone. In Washington it is a badge of honor to be wiretapped and everyone talks about clicks on the phone, but it was quite another thing to learn that day and night for almost two years the FBI *had* in fact listened to all that was said on my phone and reported the interesting tidbits to Henry Kissinger, H.R. Haldeman, and Richard Nixon.

Despite the tradition of the Eastern Establishment that one does not sue senior officials of the government, I saw no choice. My wife, my three sons (David, Mark, and Gary) and I filed suit against Kissinger, et al. — the full Watergate cast with Nixon added as a later addition. The suit is now slowly moving through the courts, producing on discovery much information about not only the 17 Kissinger taps, but the entire FBI program of warrantless surveillance. In the next issue of First Principles, we will be drawing on much of that information on national security surveillance that is not under court seal.

More recently, through the Project on National Security and Civil Liberties, I have been involved in an effort to use the Freedom of Information Act to pry "secrets" from the national security bureaucracy.

From all of this, I have come to a belief that we need to return to *First Principles* — most of all to the notion that our system can and must function within the constraints of the Constitution, even when dealing with matters of national security. The United States is a strong and secure nation. We do not face the immediate threats to survival which confronted the Founding Fathers or which face some nations today. We can well afford to give our civil liberties the breathing space they need and deserve. We should not eliminate secrecy but reduce it to that bare minimum of information that genuinely requires protection, so that we can have the free and informed debate on national security that we need. We should restore the Bill of Rights to the favored position in our constitutional scheme that it was intended to have and to insist that national security objectives be pursued by all agencies of the government within the limits set by the Constitution.

The place to begin is with the CIA and the FBI. Next month in Point of View you can read one person's view of what to do about the intelligence community. Free, I promise you, of any more intrusions from an unwritten memoir.

Contributions to the Project are tax deductible; they should be made out to either the American Civil Liberties Union Foundation or the Fund for Peace, c/o Project on National Security and Civil Liberties, 122 Maryland Avenue, N.E., Washington, D.C. 20002

SEND TO:

_____
Name

_____
Address

Please fill out mailing label:

Point Of View

Where I'm At

MORTON H. HALPERIN

Hanging, it has been said, clears the mind. So too, I have discovered, does being wiretapped. If Watergate, Vietnam and the scandals of the intelligence community have served to alert a great many people to how blind devotion to the shibboleth of "national security" can threaten our constitutional system and our Bill of Rights, my personal encounter with being wiretapped has no doubt sharpened my interest and influenced its content.

Since I will be contributing a monthly column to First Principles, I thought it might help both the readers and myself to devote this inaugural piece to a brief description of where I am at and how I got there. Thus warned, the reader can discount as he or she chooses the views which will follow.

First off, I come to the subject of national security and civil liberties from a background in foreign policy and national defense. I remember learning little or nothing about the meaning of the Bill of Rights during the educational process which focused increasingly on external threats to the security of the United States. Granted, one heard occasionally of the concern that the Cold War would destroy constitutional rights, but that was rejected along with other theories which ignored American uniqueness and invincibility. The Supreme Court, it was said, would guard our rights — but in a way which did not interfere with the requirements of combatting world-wide communism.

Since then, so many seminal events have been crowded into the past few years that it is difficult to reconstruct the process by which I came to an understanding of the need to balance national security interests with constitutional rights and to do so in a way that preserves those rights while protecting us from potential threats from abroad.

The Nixon administration's attempt to prevent the publication of Pentagon Papers and then to put Daniel Ellsberg and Anthony Russo in jail was the first episode that threw me actively into this arena. Having had administrative responsibility for the production of the Papers, I knew they contained nothing which would cause serious injury to national security. I watched with amazement as the Justice Department, without knowing what was in the study, sought to persuade court after court that they should be suppressed.

continued on page 15

First Principles
is published by the
Project on National Security and Civil Liberties, which is sponsored jointly by the American Civil Liberties Union Foundation and the Center for National Security Studies of the Fund For Peace.

Morton H. Halperin, Project Director

Christine M. Marwick, Newsletter Editor

Florence M. Oliver, Administrative Assistant

122 Maryland Avenue, N.E., Washington, D.C. 20002.
(202) 544-5380

Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.

JAMES MADISON TO
THOMAS JEFFERSON,
MAY 13, 1798